IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAUMON MONDELL OKYERE,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2006-1055
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

C. JOHNSON, VICE PRESIDING JUDGE:

Appellant, Jaumon Mondell Okyere, was convicted by a jury in the District Court of Tulsa County, Case No. CF-2005-1593, of First Degree Murder (Count I) and Child Neglect (Count II). The jury assessed punishment at life imprisonment without the possibility of parole on Count I and twenty-five years imprisonment on Count II. The trial court sentenced Appellant accordingly, ordering the sentences to run consecutively. From this Judgment and Sentence Appellant has filed a timely appeal to this Court.

FACTS

Melonie Totty and Appellant had been in a relationship with each other for several years prior to February and early March of 2005. During these months they were separated and Totty began seeing another man, Richard Briggs. When Appellant found out that Totty was seeing Briggs, he became angry and told her that he was going to kill Briggs. On March 16, 2005, Appellant told Totty to call Briggs to set up a meeting with him. Appellant wanted Totty to arrange to pick up Briggs and drive him to a location near

Appellant's mother's house where Appellant would be waiting for them. Totty tried several times to reach Briggs by telephone but Briggs did not answer her calls. When Totty was unable to reach Briggs, Appellant pointed his gun at her and threatened to kill her and her family. After Appellant calmed down, he and Totty went to her residence where they went to sleep.

The next day, on March 17, 2005, after Totty got off work at 4:00 p.m., she met Appellant at the apartment of mutual friends, Melvin Matthews and Jennifer Morrison. While there, Appellant was in possession of a red duffle bag in which he carried a Mac 11 nine millimeter semiautomatic gun. He continued to ask Totty if she called Briggs. Totty called Briggs and eventually spoke with him. She told him that she wanted to meet him that night and Briggs agree to call her back. After Totty and Appellant left Matthews' and Morrison's apartment, they went to Appellant's sister Shamika's apartment. While at Shamika's apartment, Totty noticed that the gun Appellant carried in his red duffle bag had a blue towel wrapped around the front of it. At about midnight, Briggs called Totty back and the two made plans to meet.

Totty and Briggs met at a McDonald's at about 1:00 a.m. on March 18, 2005. Pursuant to Appellant's directive, Totty told Briggs that her friend's boyfriend's car had broken down and she needed to help him. Briggs had Totty follow him to his house where he dropped off his car and got into Totty's car, bringing with him his five month old daughter who was strapped into a child car seat. Before they went to 'assist' Appellant, they stopped at a convenience store where Briggs purchased some juice, Grandma's cookies and blunts.

When Briggs got back into Totty's car, she drove to a location on 76th Street North where Appellant had pulled his car to the side of the road. The hood was up and the hazard lights were flashing to make it appear that the car had broken down. Totty stopped by Appellant's car and Appellant got into the backseat of her car carrying with him his red duffle bag.

Appellant directed Totty to turn on Pittsburg and then pull into a circle drive around an oil well. When she stopped, Appellant got out of the car, opened the front passenger door and pointed the gun, still wrapped in a blue towel, at Briggs. He ordered Briggs out of the car and moved him toward the front of the car where he shot him several times. He then got back in the car and told Totty to take him back to where the car he was driving was parked by the side of the road. After this, Appellant changed out of his clothes and discarded them in a trash can, he put Briggs' baby, still in its car seat into the back of a pickup parked in an apartment parking lot,[1] and he cleaned and disassembled his gun which he also discarded. Totty noticed that the towel wrapped around the gun looked burnt.

Briggs' body was discovered at around 6:00 a.m. on March 18, 2005. Blue cloth fibers were found on his face and within the blood pool near his head. A package of Grandma's cookies was also found near his body. Six nine millimeter shell casings were found at the scene. Briggs had been shot thirteen times and it was determined that he died from multiple gunshot wounds.

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[1] The baby was discovered at around 5:30 in the morning when an occupant of the apartment complex heard it crying as he was walking out to his car to leave for work. It was very cold and the child was uncovered but otherwise unharmed.

PROPOSITIONS

Appellant and Melonie Totty were charged as co-defendants. Totty, while represented by Don Palik, a Tulsa County Assistant Public Defender, waived her right to a preliminary hearing and testified against Appellant at his preliminary hearing. Appellant was, at the time, represented by private counsel. Subsequent to Appellant's preliminary hearing, Totty engaged private counsel and Appellant's private counsel withdrew from representation. Don Palik, from the Tulsa County Public Defender's Office was appointed by the district court to represent Appellant. Shortly thereafter, Mr. Palik filed an application to withdraw as attorney of record citing conflict of interest as the basis for his request.[2] The district court allowed Mr. Palik to withdraw but ordered the Tulsa County Public Defender's Office to continue to represent Appellant. On March 28, 2006, prior to Appellant's trial, a hearing was held on the issue of representation. Over the protestations of both Appellant and the Tulsa County Public Defender, Pete Silva, the district court ruled at the hearing that the new Assistant Public Defender assigned to represent Appellant, Allen Malone, was not prevented from doing so by a conflict of interest.

In his first proposition, Appellant argues that the district court's decision resulted in the denial of his Sixth Amendment right to the effective assistance

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[2] Appellant also protested his representation by the Tulsa County Public Defender's Office in a letter he wrote to the district court judge.

of counsel.[3] The Supreme Court has recognized that, "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). The Sixth Amendment right to assistance of counsel "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed.2d 680 (1942). However, the Supreme Court also has recognized that "[r]equiring or permitting a single attorney to represent codefendants, ... is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978).

Where, as in the present case, the risk of conflict of interest is brought to the trial court's attention in a timely fashion, it is incumbent upon the trial court "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484, 98 S.Ct. at 1178. The failure of the trial court to adequately address a timely objection to joint representation of conflicting interests will be found to deprive a defendant of the constitutional guarantee of assistance of counsel. *Id.*, 435 U.S. at 484-90, 98 S.Ct. at 1178-82. *See also Brown v. State*,

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[3] In the context of this proposition Appellant discusses the Oklahoma Rules of Professional Conduct at some length. Such rules, while pertinent to any discussion of attorney conduct when the rules touch on subjects raised in a claim of ineffectiveness, do not lay the groundwork for claims of ineffectiveness. *See Smith v. State*, 2006 OK CR 38, ¶ 36, 144 P.3d 159, 167.

1998 OK CR 77, ¶ 18, 989 P.2d 913, 922.

The Court's focus in *Holloway* was upon protestations against joint representation made by defense counsel. The Supreme Court noted that "most courts have held that an attorney's request for the appointment of separate counsel, based upon his representation as an officer of the court regarding a conflict of interests, should be granted." *Id.*, 435 U.S. at 485, 98 S.Ct. at 1179. This is due, in part, to the fact that defense counsel has the ethical obligation to advise the court of any conflicts and is in the best position to determine when a conflict of interest exists or will probably develop in the course of a trial. *Id.*, 435 U.S. at 485-86, 98 S.Ct. at 1179.

In the present case, it was defense counsel, Mr. Palik, who properly advised the district court of a conflict of interest after the court appointed him to represent Appellant subsequent to his prior representation of the co-defendant in an earlier proceeding. The district court properly responded by allowing Mr. Palik to withdraw. However, at the hearing on representation, the Tulsa County Public Defender, Mr. Silva advised the district court as follows:

> [W]e continue in the Public Defender's Office to take the position that the law office rule does apply to our office. I have explained to Mr. Okyere that our original motion to withdraw had nothing to do with him personally. It was concerning our representation of a now State's witness, and, of course, the Court recognized that conflict.
>
> My concern goes - - while I have not read the gentleman's letter to the Court, my concern goes to the appearance and the propriety of our office continuing to represent an individual where we had a hand in preparing evidence, facilitating evidence to be used against that individual. I have assured the gentleman that my office will vigorously represent him, that we'll have no mixed allegiances, that Mr. Palik will have nothing to do with this case, and it has been

> assigned, in fact, to a lawyer, while not new to the practice of law is new to our office, who certainly knows Mr. Palik but has not been working with Mr. Palik and in fact was not even in our office when the arrangements with the co-defendant were made in this case.
>
> However, I certainly do understand the gentleman's concerns, and I don't know if there's anything I can do to allay those concerns, and we continue to take the position that the law office rule does cover our office.

(Transcript of Hearing Regarding Alternate Counsel, pp. 3-4).

After considering the Public Defender's concerns and Appellant's protestations, the district court declined to remove the Tulsa County Public Defender's Office from representing Appellant finding that:

> [T]he fact that somebody is in that same Public Defender's Office doesn't cause a conflict as to everyone. And when a person doesn't have any association with the previous problem or the previous taint, then there isn't any reason that they couldn't represent you.
>
> . . .
>
> So at least for now, that's - - and Mr. Silva has assured me and you that that person will not be tainted in the future, they won't go to Don Palik and talk to him about what's going on and they will represent you vigorously in this case within the bounds of the law.

(Transcript of Hearing Regarding Alternate Counsel, p. 5).

Despite the opportunity provided by the district court for inquiry into the possibility of a conflict of interest, the Tulsa County Public Defender did not advise the court at the hearing of a conflict of interest regarding the continued representation of Appellant by his office. Rather, he protested the representation based upon the appearance of impropriety and an office policy against such representation and went on to assure the Court and Appellant that his office could provide vigorous, conflict free representation. While we

strongly agree with the principles set forth in *Holloway*, that trial courts should give great credence to requests made by defense counsel for the appointment of separate counsel based upon conflict of interests, such a request was simply not made by the Public Defender at the hearing on representation.

We find that the trial court took adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel and the record supports the court's decision not to appoint counsel outside the public defender's office. We cannot conclude either that an actual conflict of interest adversely affected Appellant's lawyer's performance, that an actual, relevant conflict existed during the proceedings, or that there was a substantial possibility that a conflict of interest affected Appellant's lawyer's representation. Appellant's counsel at trial prosecuted the defense with competence and vigor. Appellant was not denied his constitutional right to effective assistance of counsel.

In his second proposition Appellant argues that it was reversible error for the trial court to grant the State's motions for continuance over his objection because the State failed to properly file written motions as is required by 12 O.S.2001, § 668.[4] Section 668 does impose procedural requirements for requesting continuances on account of the absence of evidence. However, the overarching concern is whether the trial court's grant or denial of a

[4] We reject Appellant's argument that violation of section 668 is structural error. Structural errors are those which affect a trial from beginning to end, such as the absence of counsel for a defendant, a biased judge, the unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to a public trial. *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

continuance impinges on a substantial right of the accused.[5] 20 O.S.2001, 3001.1. "Unless a procedural failure results in a miscarriage of justice or constitutes a substantial violation of appellant's right's this Court cannot set aside a verdict." *Hunnicutt v. State*, 1988 OK CR 91, ¶ 7, 755 P.2d 105, 109.

Although record indicates that the trial was continued several times, and Appellant complains about the granting of more than one motion for continuance, only one continuance, that granted on October 3, 2005, can fairly be inferred to have been requested on account of the absence of evidence. Accordingly, only this continuance was subject to the procedural requirements of section 668. Even if the trial court erred in granting the continuance on October 3, 2005, this error cannot be found to have resulted in a miscarriage of justice or a substantial violation of Appellant's rights. While Appellant claims he was prejudiced by the grant of additional time to the State for the purpose of securing cell phone records, Appellant's assertion of prejudice is speculative, at best. It is likely that the evidence the State apparently sought extra time to produce would have been forthcoming and admissible either sponsored through a previously endorsed witness or in rebuttal. Appellant's additional claim of prejudice based upon his alleged conflict of interest is without merit in light of discussion above in Proposition I. This argument warrants no relief.

Appellant argues in Proposition III, that the evidence presented at trial

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[5] This Court has not hesitated to grant relief to a defendant when a trial court's ruling on a continuance request deprived him of a fair trial, regardless of whether the statutory procedural requirements were followed to the letter. *See Warner v. State*, 2001 OK CR 11, ¶¶ 12-17, 29 P.3d 569, 574-75; *Plumlee v. State*, 1971 OK CR 309, ¶¶ 21-23, 488 P.2d 939, 943-44.

was insufficient to prove beyond a reasonable doubt all of the elements of First Degree Murder. He specifically complains that the only evidence implicating him in the death of Richard Briggs was the trial testimony of Melonie Totty. This accomplice testimony, he asserts, was not sufficiently corroborated.

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." 22 O.S.2001, § 742. Rather, accomplice testimony must be corroborated with evidence, which standing alone tends to link the defendant to the commission of the crime charged. *Pink v. State*, 2004 OK CR 37, ¶ 15, 104 P.3d 584, 590. An accomplice's testimony need not be corroborated in all material respects but requires "at least one material fact of independent evidence which tends to connect the defendant with the commission of the crime." *Cummings v. State*, 1998 OK CR 45, ¶ 20, 968 P.2d 821, 830. "Further, circumstantial evidence can be adequate to corroborate the accomplice's testimony." *Id.*

It is clear that Melonie Totty was an accomplice as she could have been indicted for the crime for which Appellant was tried.[6] *See Anderson v. State*, 1999 OK CR 44, ¶ 23, 992 P.2d 409, 418. Thus, it was indeed necessary that Totty's testimony be properly corroborated. While all evidence of the actual killing was provided through Totty's testimony, other witnesses provided

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[6] Totty entered a guilty plea to the crime of Second Degree Murder on October 2, 2006. She was sentenced to thirty years imprisonment with ten years suspended.

additional evidence connecting Appellant with the commission of the crime.

Melvin Matthews testified that he knew Appellant and Totty in the winter of 2005 and remembered that around February of that year Appellant and Totty broke up. He testified that Appellant seemed upset about the break-up and started carrying a red gym bag during this time. Matthews testified that Appellant carried a Mac 11 semiautomatic with nine millimeter bullets in this bag. He also testified that Appellant told him that he wrapped the gun in a towel when he practiced shooting it to make it quieter. Matthews testified that on the evening of March 17, 2005, Appellant and Totty came over to his apartment. Appellant was upset and told him that he was going to kill someone who owed him money. Appellant had his red bag with him at the time. Appellant and Totty left after about an hour. Later that night, Totty called and spoke with Matthews. She was upset and sounded like she had been crying. Totty told him that Appellant wanted her to set up some guy so that Appellant could kill him. Matthews did not see Appellant again until the next morning. He was not carrying the red bag. When Matthews asked about the bag, Appellant replied that someone had "got down through here last night" and he had to get rid of it.

We find Matthews' testimony provided independent evidence of at least one material fact tending to connect the defendant with the commission of the crime. Totty's testimony was properly corroborated and the evidence was sufficient to support the finding by a rational trier of fact that each of the essential elements of the crime charged existed beyond a reasonable doubt.

Spuehler v. State, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

Appellant argues in his fourth proposition that his conviction for Child Neglect must be reversed because the jury was improperly instructed on this crime. Specifically, he asserts that one of the elements of this crime was omitted from the instruction given to the jury. The omitted element was the requirement that the crime be committed by a person responsible for the child's health or safety.[7] Although defense counsel did not object to the instruction as given, Appellant asserts on appeal that this omission constituted plain error which requires reversal.

It is true that the general rule is that failure to object to the trial court's instructions waives all but plain error. *See Wood v. State,* 2007 OK CR 17, ¶ 17, 158 P.3d 467, 475. However, this Court has held that, "[w]hether or not the defendant agrees to the instructions, it is plain error to fail to instruct on the elements of a crime." *Harmon v. State,* 2005 OK CR 19, ¶ 7, 122 P.3d 861, 864. Even so, reversal is not warranted if we find the error was harmless beyond a reasonable doubt. *Mitchell v. State,* 2005 OK CR 15, ¶ 71, 120 P.3d 1196, 1214. "The question is whether, beyond a reasonable doubt, the jury's

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[7] The Oklahoma Jury Instructions, OUJI-CR (2nd) 4-37, set forth the following instruction for the crime of Child Neglect:

> No person may be convicted of neglect of a child unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
> First, a person responsible for the child's health or safety;
> Second, willfully/maliciously;
> Third, failed/omitted to provide;
> Fourth, (adequate food, care, shelter, medical care, and supervision)/(special care made necessary by the physical/mental condition of the child);
> Fifth, for a child under the age of eighteen.

verdict was not affected by the erroneous instruction." *Harmon*, 2005 OK CR 19, ¶ 17, 122 P.3d at 864.

The Child Neglect statue states an intent to "provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety or welfare of such children." 10 O.S.Supp.2002, § 7102(A). A "person responsible for a child's health, safety or welfare," is specifically defined within this statute to include the following individuals:

> [A] parent; a legal guardian; a custodian; a foster parent; a person eighteen (18) years of age or older with whom the child's parent cohabitates or any other adult residing in the home of the child; an agent or employee of a public or private residential home, institution, facility or day treatment program as defined in Section 175.20 of this title; or an owner, operator, or employee of a child care facility as defined by Section 402 of this title....

10 O.S.Supp.2002, § 7102(B)(5).

While, as the State accurately advises, this Court has held that a babysitter meets the definition of a person responsible for a child's health or safety[8], it is not, as the State argues, a forgone conclusion that a person in Appellant's position would also be found to be a person responsible for a child's health, safety or welfare. This is especially true in light of the definition of the term provided in section 7102(B)(5). Accordingly, this Court cannot find that the failure to properly instruct the jury on all elements of the crime of Child Neglect was, under the facts of this case, harmless beyond a reasonable doubt.

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[8] *Townsend v. State*, 2006 OK CR 39, 144 P.3d 170.

Appellant's Judgment and Sentence on Count II, Child Neglect, must be reversed with instructions to dismiss.

In his fifth proposition, Appellant complains that the trial court erred in excusing for cause four prospective jurors and one alternate juror. He argues specifically that none of the excused jurors provided a sufficient basis upon which the trial court could properly determine that they were unable to perform their duties under the law. The record reflects that three of the prospective jurors stated that they would be unable to listen fairly to the evidence, follow the instructions and reach a fair and impartial verdict. The other potential juror appeared to have been less than candid about health problems that could affect his ability to sit as a juror and the alternate juror told the trial court that he, too, could not follow the law. Neither the prosecutor nor defense counsel objected to the excusal of any of the prospective jurors. Nor did they seek to inquire further of the prospective jurors.

Appellant fails to establish that these dismissals were erroneous and cites no relevant authority in support of his claim. He does not allege that any juror who served on his jury was unfair or biased against him; and he totally fails to establish any prejudice. This Court has held that the decision whether to excuse a juror for cause is within the trial court's discretion. Appellant fails to show the trial court abused its discretion excusing these prospective jurors for cause and this proposition is denied. *Browning v. State*, 2006 OK CR 8, ¶

11, 134 P.3d 816, 829. *See also Thompson v. State*, 2007 OK CR 38, ¶ 30, ___ P.3d ___, ___.

In his sixth assignment of error, Appellant complains that the trial court erred in giving the jury the standard prior inconsistent statement instruction regarding three defense witnesses. He asserts that this instruction was not warranted because there was little evidence presented that these witnesses had made prior inconsistent statements. The determination of which instructions will be given to a jury is a matter entrusted to the discretion of the trial court and absent an abuse of discretion, this Court will not reverse if the instructions as a whole accurately state the applicable law. *Smith v. State*, 2007 OK CR 16, ¶ 79, 157 P.3d 1155, 1179. Upon review of the record before this Court, we find that the evidence was sufficient to warrant the limiting instruction on the proper use of impeachment evidence regarding each of these defense witnesses. We do not find that the trial court abused its discretion in so instructing.

Appellant argues in his seventh proposition that the trial court improperly permitted a State rebuttal witness to testify beyond his field of expertise. The witness about whom Appellant complains, was Mr. Jeff Rose, an employee of U.S. Cellular. Mr. Rose testified that in his opinion, the cellular telephone records indicated that Appellant's cell phone was not in a stationary location in the early morning hours of March 18, 2005.[9]

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[9] This rebuttal evidence was relevant because at trial Appellant testified that although he set Briggs up to be "tortured" by other persons, he was not present when Briggs was killed. Rather, Appellant claimed to have been at his sister's apartment speaking on his cell phone with Totty and the others who were responsible for Briggs' death. Appellant testified that he was at this apartment from about 11:00 p.m. on March 17 until about 8:00 or 9:00 a.m. the following morning.

Expert opinion testimony is based on "scientific, technical, or other specialized knowledge" and can be provided only by a witness who is "qualified as an expert," in the field at issue, "by knowledge, skill, experience, training, or education." 12 O.S.2001, § 2702. Admission of expert testimony is within the trial court's discretion. *Warner v. State*, 2006 OK CR 40, ¶ 22, 144 P.3d 838, 860. We find that the trial court did not abuse its discretion in allowing Mr. Rose, an engineer with six years experience as a regional performance manager at U.S. Cellular, to give opinions about cell tower routing as he was qualified to do so based upon his specialized knowledge of such.

In his eighth proposition, Appellant argues that he was denied his Sixth Amendment right to the effective assistance of counsel for several alleged failings of his trial attorney.[10] This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: [1] that counsel's performance was constitutionally deficient; and [2] that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding.

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[10] In conjunction with the claims in this proposition, Appellant has filed a Rule 3.11 motion for an evidentiary hearing on the issue of ineffective assistance of counsel. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). To warrant an evidentiary hearing, Appellant must present this Court with clear and convincing evidence of a strong possibility that counsel was ineffective for failing to identify or use the evidence raised in the motion. Appellant's submitted material does not meet this standard.

Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In support of his proposition, Appellant argues that trial counsel was ineffective for failing to interview several witnesses in preparation for Appellant's defense, for failing to secure evidence provided to Appellant's prior attorney, for failing to conduct inquiry into the jurors excused for cause, for failing to object to prior inconsistent statement instructions, for failing to object to the use of Mr. Rose as an expert witness and for failing to object to the instruction on Child Neglect. Some of these alleged failing concern issues raised and addressed above. We found in Proposition VI that the trial court did not abuse its discretion in giving the instructions on prior inconsistent statements and we found in Proposition VII that the trial court did not abuse its discretion in allowing Mr. Rose to testify as an expert. Thus, as to these two alleged failings of counsel, Appellant has not shown that counsel's performance was deficient. While we did hold in Proposition IV that the instruction on Child Neglect was improper, trial counsel's failure to object to that instruction is remedied by our reversal of Appellant's conviction on Count II. As to the remaining allegations, we find that even if counsel was deficient for failing to interview certain witnesses, secure taped statements and vior dire the dismissed jurors more thoroughly, there has been no showing that this

deficient performance deprived Appellant of a fair trial with a reliable result. Appellant has not shown a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Accordingly, this proposition of error is denied.

In his final proposition Appellant claims that the trial errors, when considered cumulatively, warrant a new trial or sentence modification. This Court has recognized that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. Upon review of Appellant's claims for relief and the record in this case we conclude that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require reversal because they did not render his trial fundamentally unfair or taint the jury's verdict. We did find, however, in Proposition IV, that instructional error requires Appellant's Judgment and Sentence on Count II be reversed with instructions to dismiss.

DECISION

The Judgment and Sentence of the district court on Count I is **AFFIRMED**. The Judgment and Sentence of the district court on Count II is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE TOM C. GILLERT, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS IN PART/DISSENTS IN PART
LEWIS, J.: CONCURS

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LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the Court's decision to affirm the judgment and sentence in Count I, but I must dissent to the reversal with instructions to dismiss in Count II. The proper procedure to correct an instructional error is to remand the case for retrial under the proper instructions. Just as with our prior decision of *Townsend v. State*, 2006 OK CR 39, 144 P.3d 170, finding that a babysitter is a person responsible for a child's health or safety, this case presents a fact question for a jury to decide when properly instructed. The facts could easily support a finding that Appellant became the *de facto* custodian of the child and was responsible under the statute. I would remand Count II for a new trial with correct instructions of the law.

I am authorized to state that Judge Arlene Johnson joins in this Concur in Part/Dissent in Part.